

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 80643-8
Respondent,)	
)	
v.)	En Banc
)	
COVELL PAUL THOMAS,)	
)	
)	
Petitioner.)	Filed June 11, 2009
_____)	

MADSEN, J.—Covell Paul Thomas was convicted of premeditated first degree murder, residential burglary, and unlawful possession of a firearm on October 31, 2000. The jury found the existence of four aggravating factors and insufficient mitigating factors. The trial court sentenced Thomas to death under RCW 10.95.030. On initial review of his case, this court “affirm[ed] each of his convictions but reverse[d] his death sentence” and remanded with instructions to sentence Thomas on the first degree murder conviction and residential burglary charges alone or hold a “new trial on the aggravating factors.” *State v. Thomas*, 150 Wn.2d 821, 876, 831, 83 P.3d 970 (2004) (*Thomas I*). On remand, the State did not seek the death penalty but instead sought life without the possibility of parole. On November 17,

2005, a jury found beyond a reasonable doubt that Thomas committed four aggravating factors. On the basis of the jury's decision, the trial judge sentenced Thomas to life without the possibility of parole. *State v. Thomas*, noted at 140 Wn. App. 1014 (2007). The Court of Appeals affirmed Thomas's sentence to life in prison without parole. Thomas petitioned for review. We granted review (*State v. Thomas*, 163 Wn.2d 1033 (2008)) and affirm the Court of Appeals.

FACTS

Before addressing the substantive matters in Thomas's case, a brief discussion of the relevant portions of our decision in Thomas's first review is required. *Thomas*, 150 Wn.2d at 876.¹ In Thomas's first petition for review, he argued that errors in the "to convict" and accomplice liability instructions unconstitutionally reduced the State's burden of proving either premeditated intent to kill or the knowledge that he was facilitating a murder.² *Id.* at 840. Acknowledging errors in the instructions, we applied the test established in *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), "for determining the harmlessness of a constitutional error" to Thomas's "to convict" and accomplice liability instructions. *Thomas*, 150 Wn.2d at 845. Noting Thomas's "major participa[tion] in the murder" (quoting respondent's brief), we stated that "[f]or the purposes of upholding

¹ A complete recitation of the facts can be found at *Thomas I*, 150 Wn.2d at 831-40.

² The State's theory during Thomas's original trial was that he either shot the victim, Richard Geist, himself, or that Thomas was an accomplice to Geist's murder.

Thomas's conviction for *first degree murder*, we find the errors in the accomplice liability and 'to convict' instructions to be harmless beyond a reasonable doubt." *Id.* at 846 (alterations in original).

Thomas also challenged the aggravating factors instruction, claiming the instructions did not require the jury to find that he personally committed the factors alleged.³ The aggravating factors instruction given in Thomas's trial read, "[t]he defendant *or* an accomplice committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime." *Thomas I*, 150 Wn.2d at 842-43 (alteration in original). We held that the "or" "removes a requirement that the jury find *any* form of actus reus *at all* on Thomas's part and relieves the State of its burden to prove the aggravating circumstances as they pertain to the defendant." *Id.* at 843. Relying on *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 717 (2000), we further held that the "instruction permits the jury to impose a death sentence on Thomas even if it finds that the aggravating factors" apply only to his accomplice. *Thomas I*, 150 Wn.2d at 843; *Roberts*, 142 Wn.2d at 505 ("[M]ajor participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder.").

After noting the holding in *Roberts* we turned to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to hold that harmless error analysis was

³ Proof of aggravating factors is the mechanism through which the State may obtain an enhanced sentence for defendants found guilty of first degree murder. RCW 10.95.020.

inapplicable to the error in Thomas’s aggravating factors instruction.⁴ *Thomas* I, 150 Wn.2d at 849. Because we were unable to find the errors in Thomas’s initial aggravating factors instructions harmless, we reversed Thomas death sentence and remanded to the trial court for either “a new trial on the aggravating factors or resentencing in accordance with this opinion.” *Id.* at 876. On remand, the State chose not to seek the death penalty again, but chose to instead seek life without the possibility of parole.

ANALYSIS

Aggravating Factors Instruction

Thomas argues that the aggravating factors instruction given to the jury in the resentencing proceeding allowed him to be “sentenced to life without parole without [the] jury ever having found that he personally committed the actus reus of the crime or intended the death of the victim or that the aggravating factors applied to him rather than to an accomplice.” Pet. for Review at 6.

In addressing the first part of Thomas’s argument, it is important to recognize that “[a]ggravated first degree murder is not a crime in and of itself; the crime is ‘*premeditated* murder in the first degree . . . accompanied by the presence of one or more of the statutory

⁴ *Apprendi* held that under the Sixth Amendment to the United States Constitution, all factors enhancing a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt and cannot be determined solely on the findings of a judge. 530 U.S. at 489. Since our decision in *Thomas* I, the United States Supreme Court has held that *Apprendi* errors can be harmless. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

aggravating circumstances listed in the criminal procedure title of the code (RCW 10.95.020).” *Roberts*, 142 Wn.2d at 501 (quoting *State v. Irizarry*, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988)). Aggravating factors are not “elements of [a] crime;” they are ““aggravation of penalty” factors.” *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995) (quoting *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)); *see also State v. Yates*, 161 Wn.2d 714, 758, 168 P.3d 359 (2007) (“[T]his court has clearly ‘held that under the statutory scheme in Washington the aggravating factors for first degree murder are not elements of that crime but are sentence enhancers that increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty.’” (quoting *Thomas I*, 150 Wn.2d at 848)). To convict an accomplice of premeditated murder in the first degree, the State need not “show that the accomplice had the intent that the victim would be killed.” *State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985). The prosecution need only prove that the defendant knew his actions would facilitate the crime for which he was eventually charged. *State v. Cronin*, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000) (“The State had to prove beyond a reasonable doubt that [the defendant] had general knowledge that he was aiding in the commission of the crime of murder.”). Thus, Thomas’s contention that the aggravating factors instruction given here was erroneous because it allowed him to be sentenced to life without parole without a finding that he personally committed the murder is without merit. The issue is not whether Thomas committed the murder as a principle; the issue

is whether he personally committed the aggravating factors.

Turning to the second part of Thomas's argument, when the State seeks to sentence a defendant to death for the crime of premeditated murder in the first degree, it must prove a defendant convicted as an accomplice to the murder personally committed aggravating factors. *Roberts*, 142 Wn.2d at 508-09 ("[W]e hold when jury instructions as used in this case allow for the possibility that the defendant was convicted solely as an accomplice to premeditated first degree murder, the defendant may not be executed unless the jury expressly finds (1) the defendant was a major participant in the acts that caused the death of the victim, and (2) the aggravating factors under the statute specifically apply to the defendant.").⁵

The special verdict form given to the jury at Thomas's resentencing proceeding read as follows:

We, the jury, make the following answers to the questions submitted by the court:

⁵ It remains an open question whether the State is required to prove the aggravating factors specifically apply to a defendant convicted as an accomplice when it is seeking life without the possibility of parole instead of the death penalty. *Thomas*, 2007 WL2379653, at *6 (Wash. Ct. App. Aug. 21, 2007) ("Neither the *Roberts* court nor any other has held that RCW 10.95.020 requires that a defendant personally commit the aggravating circumstances when the State seeks a punishment of life without parole."); *but see In re Howerton*, 109 Wn. App. 494, 501, 36 P.3d 565, 569 (2001) ("[A] defendant's culpability for an aggravating factor cannot be premised solely upon accomplice liability for the underlying substantive crime absent explicit evidence of the Legislature's intent to create strict liability. Instead, any such sentence enhancement must depend on the defendant's own misconduct.") (citing *State v. McKim*, 98 Wn.2d 111, 117, 653 P.2d 1040 (1982) (holding that the accomplice liability statute's strict liability for the substantive crime was not intended by the legislature to apply to sentence enhancements that must instead be based on "the accused's own misconduct")). Because the State proved all four factors specifically applied to Thomas, the question is not squarely before this court.

QUESTION: Has the State proven the existence of the following aggravating circumstances beyond a reasonable doubt?

(1) Did the defendant commit the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime?

...

(2) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the first degree?

...

(3) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the second degree?

...

(4) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from residential burglary?

...

Clerk's Papers (CP) at 202.

The significant difference between this verdict form and the one we held unconstitutional for the purpose of upholding Thomas's death sentence in *Thomas I* is the removal of the phrase "or an accomplice." Each question specifically asked if the defendant, Thomas, personally committed the aggravating factors; the jury answered yes to each question. These instructions left no chance, as there was in Thomas's first trial, that the jury could have answered yes if they thought an accomplice, rather than Thomas, committed the aggravating circumstances. *See State v. Jeffries*, 105 Wn.2d 398, 420, 717 P.2d 722 (1986) ("It is impossible for a jury to find . . . aggravating circumstances without also finding that the defendant intended to commit them."). Thomas's jury in the resentencing proceeding found that he personally committed all four aggravating factors as required by this court in *Thomas*

I.

Due Process

Thomas next argues that jury instruction 1, informing the jury that Thomas had been convicted of first degree murder, “required the jury to accept as given that [he] personally committed the murder” and thereby violated his rights to due process. Pet. for Review at 8-9; CP at 179. Thomas’s jury at resentencing was instructed that he had been “convicted of the crime of murder in the first degree” and that the finding of guilt should not be considered as proof of the aggravating factors. CP at 179. The jury was also informed that Thomas was one of four people charged with the murder of Richard Geist. XV Verbatim Report of Proceedings (VRP) (Nov. 15, 2005) at 1643. During the resentencing proceeding, the defense argued that Thomas’s conviction did not “settle[] the fact that he . . . actually shot Mr. Geist.” *Id.* at 1643-44. After hearing all the evidence, and the arguments by Thomas’s counsel, the jury found beyond a reasonable doubt that Thomas had personally committed all four aggravating factors.

“[D]ue process simply requires that the jury be instructed that the prosecution must establish its case ‘beyond a reasonable doubt,’” and that the defendant be “‘presumed innocent.’” *State v. Woods*, 143 Wn.2d 561, 594, 23 P.3d 1046 (2001) (quoting *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) and *State v. McHenry*, 88 Wn.2d 211, 220, 558 P.2d 188 (1977)). The instructions at Thomas’s resentencing proceeding did not require the jury to accept

as given that he personally committed the murder; they only required the jury to determine if he personally committed the aggravating factors. The question of whether the defendant committed first degree murder personally or as an accomplice was not before the jury, and whether Thomas was the principle or an accomplice is irrelevant to the question of whether he personally committed the aggravating factors. The instructions in this case meet the constitutional requirements of due process and right to trial by jury.

Comment on the Evidence

Thomas also argues that instruction 1 violated his right against impermissible comment on the evidence under article IV, section 16 of the Washington State Constitution. Pet. for Review at 9-10. Article IV, section 16 of the Washington State Constitution prohibits a judge from stating to the jury her personal attitude toward a case.⁶ A judge makes an impermissible comment on the evidence when she inaccurately states the law applicable to an issue in the case. *City of Seattle v. Smiley*, 41 Wn. App. 189, 192, 702 P.2d 1206 (1985).

Ordinarily, in first degree murder cases where the State seeks a higher penalty on the basis of aggravating factors, the same jury hears evidence on both the elements of the underlying murder charge and the aggravating factors. The jury makes findings of aggravation via a special verdict form only *after* it has found a defendant guilty of first degree murder. Thus, it is unnecessary to inform the jury that the defendant has been found guilty

⁶ “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Const. art. IV, § 16.

either as a principle or as an accomplice.

In this case, the jury at Thomas's resentencing did not know of Thomas's guilt. In order to determine whether Thomas committed the aggravating factors, it was necessary to inform the jury of this fact. If the jury had not been given the evidence of Thomas's conviction, the jury essentially would be required to retry him on the already settled issue of guilt for the underlying murder. The judge in Thomas's resentencing did not inaccurately state the law in Thomas's case. Thomas was, in fact convicted of first degree murder; the judge did not make an impermissible comment on the evidence.

Power to Empanel a Jury

Thomas next argues that there is no mechanism in chapter 10.95 RCW by which the trial court can empanel a jury solely to consider the existence of aggravating factors. Specifically, he asserts that since RCW 10.95.050(4) outlines the procedures for empaneling a jury to hear the death penalty phase of a criminal trial and nothing in chapter 10.95 RCW or the Sentencing Reform Act of 1981 (chapter 9.94A RCW) provides for empaneling a jury specifically to hear aggravating factors, the trial court has no authority to empanel a jury for such a proceeding. Pet. for Review at 16-17; Suppl. Br. of Pet'r at 15. Thomas further asserts that our refusal in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), to create a procedure for empaneling aggravating factors juries requires us to reverse his sentence. *Id.* at 151-52 ("This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did

not provide such a procedure and, instead, explicitly assigned such findings to the trial court. To create such a procedure out of whole cloth would be to usurp the power of the legislature.”), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Thomas’s argument fails for two reasons. First, in *Hughes* this court was construing the Sentencing Reform Act of 1981, not the aggravated murder statutes under which Thomas was convicted. *Id.* at 148-49; *see also State v. Goldberg*, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003) (“RCW 10.95.020 defines the aggravating circumstances that make premeditated first degree murder punishable under that chapter rather than under the Sentencing Reform Act of 1981.”). Since even Thomas himself acknowledges that his case is not controlled by the Sentencing Reform Act of 1981 (Suppl. Br. of Pet’r at 15), *Hughes* is inapplicable in this case.⁷

Second, the power to empanel a jury to hear aggravating factors is a court mandated component of the power to hear cases “required to be tried by a jury” and not a procedure crafted out of “whole cloth.” CrR 6.1(a). A defendant in a criminal trial has the right to have a jury determine issues of fact. U.S. Const. art. III, § 2, para. 3 & amend. VI; Const. art. I, §

⁷ Furthermore, the reasoning in *Hughes* does not apply. The court in *Hughes* noted that to empanel a jury to make factual findings when RCW 9.94A.535 “explicitly directs the trial court” to make them “would be contrary to the explicit language of the statute.” 154 Wn.2d at 149. Unlike RCW 9.94A.535, RCW 10.95.020 does not provide that the sentencing judge is to determine the presence of aggravating factors.

21; *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)

(“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (quoting *Apprendi*, 430 U.S. at 490)). As “aggravation of penalty factors,” and not elements of a crime, aggravating factors need not be charged in the information, but nevertheless must be proved to a jury beyond a reasonable doubt. *Kincaid*, 103 Wn.2d at 312 (“The penalty for that murder [is] properly enhanced to life imprisonment without possibility of parole when the jury unanimously [finds] by a special verdict that the existence of a statutory aggravating circumstance had been proved by the State beyond a reasonable doubt.”).

Court rules also specify the requirements for making special findings like aggravating factors, stating, “[t]he court may submit to the jury forms for such special findings which may be required or authorized by law.” CrR 6.16(b). Prior arguments to this court that aggravating factors must be included in the elements instruction to the jury were rejected: “where the legislature has established a statutory frame work which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form. So long as the jury is instructed it must unanimously agree beyond a reasonable doubt . . . the constitution is not offended.” *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415

(2005).⁸

To say the trial court under this court’s mandate had no power by which to empanel a jury to hear Thomas’s resentencing on aggravating factors is to say the court had no power to uphold Thomas’s constitutional right to a jury. This argument is without merit. The trial court properly empaneled Thomas’s jury at resentencing under CrR 6.1.

Double Jeopardy

Thomas next argues that “retrial on the aggravating factors violated his state and federal constitutional rights to be free of double jeopardy.” Pet. for Review at 10. Both the Washington State and federal double jeopardy clauses “bar[] trial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’” *State v. Eggleston*, 164 Wn.2d 61, 70, 187 P.3d 233 (2008) (alteration in original) (citing *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d

⁸ Petitioner points to earlier problems in the history of the death penalty statute to support his argument that “the State may not constitutionally seek life imprisonment without possibility of release or parole for those who are found guilty of aggravated first degree murder.” *State v. Frampton*, 95 Wn.2d 469, 484, 627 P.2d 922 (1981). Language in *Frampton* must be understood in the context of that case and limited as such. The State in *Frampton* attempted to secure a sentence of life without parole for a defendant whose death sentence was held unconstitutional under *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). The State argued that while the application of the death penalty was unconstitutional, because the judge and not the jury found the aggravating factors, a sentence of life without parole remained constitutionally sound. The way the statute was then written, the court held, made “[a]ll of the jury sentencing procedures, including life without the possibility of parole, . . . predicated on the filing of a notice of intention to request the death penalty,” as such, “if the death penalty scheme is unconstitutional . . . the question of life imprisonment without possibility of parole may not be considered.” *Frampton*, 95 Wn.2d at 480-81. The statute at issue in *Frampton*, chapter 10.94 RCW, was repealed in 1981. RCW 10.04.010 to 10.94.900, *repealed by* Laws of 1981, ch. 138, § 24 (effective May 14, 1981).

1121 (1996)). When a defendant's conviction is overturned on review and the defendant is retried, "the double jeopardy clause is not ordinarily offended." *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (citing *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964)), *cert. denied*, 459 U.S. 842 (1982). Only when a conviction has been reversed for insufficiency of evidence does the reversal bar a retrial. *Id.* (citing *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981)).

In death penalty cases, the double jeopardy clause prevents "retrying a defendant on aggravating factors . . . , when a previous jury ha[s] *rejected* imposition of the death penalty." *Eggleston*, 164 Wn.2d at 70 (emphasis added) (citing *Bullington v. Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981)). This court "has declined to extend [double jeopardy] protection against retrial to noncapital sentencing aggravators, limiting the protection to death penalty determinations." *Id.* at 71 (citing *Monge v. California*, 524 U.S. 721, 730, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998)).

This court reversed the jury's findings of aggravating factors due to errors in the jury instructions, not insufficiency of evidence. Thomas's first jury found him guilty of aggravated first degree murder and accepted the imposition of the death penalty. This court's reversal of his death sentence for instructional error and remand for further proceedings was not a final disposition of his case. Thomas was resentenced on the basis of jury findings regarding aggravating factors, double jeopardy protections, therefore, do not attach.

Batson v. Kentucky

Lastly, Thomas argues that the striking of juror 33, the lone African-American juror on the venire, was a violation of his rights under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Pet. for Review at 17-18. At the hearing on the *Batson* issue, the prosecution agreed with the defense as to the accuracy of the *Batson* standard and then proceeded to make “a record regarding the statements made by Juror No. 33.” 7 VRP (Oct. 31, 2005) at 120. Excerpts from voir dire transcripts show that juror 33 stated as follows:

MR. THORNTON [defense counsel]: But you agree that there’s some sort of, when you walk in, human nature that we make a judgment?

.....
JUROR NO. 33: I think that’s a stupid question. I mean Ted Bundy, did he look guilty? Jeffrey Dahmer, next-door neighbor, did he look guilty or act guilty? That’s more of a racist statement than anything else. I mean, I look at this jury pool. Look at that. Is this really a makeup of Tacoma or Pierce County? This is bizarre, man.

MR. THORNTON: You agree with that statement?

JUROR NO. 33: You have more dark in the bailiff than we have in this jury pool, and that’s the way the prosecutors want it.

VRP (Supp. Oct. 27, 2005) at 3-4.

The prosecution characterized the juror’s comments as “clearly was hostile toward the State” and as such, gave a “race-neutral reason” for the State’s exercise of the challenge. 7 VRP at 120-21. Thomas’s counsel argued that the statement, ““I think the State would like it that way,”” was not a sufficient race-neutral reason for striking the juror. *Id.* at 121. After this exchange, the trial judge applied the law

as it was stated in *State v. Ashcraft*, 71 Wn. App. 444, 459, 859 P.2d 60 (1993), that the exclusion of the lone representative of a constitutionally cognizable class from the venire is generally insufficient to establish a prima facie case of discriminatory intent and denied Thomas's *Batson* challenge. 7 VRP at 122.

A defendant's right to "be tried by a jury whose members are selected pursuant to nondiscriminatory criteria" is founded in the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Batson*, 476 U.S. at 85 (citing *Martin v. Texas*, 200 U.S. 316, 321, 26 S. Ct. 338, 50 L. Ed. 2d 497 (1906)). A defendant challenging the State's action in venire selection must ultimately show "a racially discriminatory purpose" on the part of the prosecutor. *Id.* at 93 (quoting *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). The defendant's burden can be met by showing that the "totality of the relevant facts" in his case gives rise to an inference of discriminatory purpose. *Id.* at 94 (citing *Davis*, 426 U.S. at 239-42). After this showing, the burden shifts to the State to "come forward with a neutral explanation" for challenging the juror. *Id.* at 97. After both sides have made their arguments, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98.

This court has held that a trial court is "not *required* to find a prima facie case [of discriminatory purpose] based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in their discretion, recognize a prima facie case in such instances." *State v. Hicks*, 163

Wn.2d 477, 490, 181 P.3d 831 (2008). The recognition that trial courts *may* but are not *required* to find a prima facie case on the basis of the State's strike of the lone remaining juror of a constitutionally cognizable group "afford[s] a high level of deference to the trial court's determination of discrimination." *Id.* at 493. This deference is necessary because findings of discrimination "largely turn on an evaluation of credibility," *Batson*, 476 U.S. at 98 n.21, and because a "reviewing court . . . analyzes only the transcripts from *voir dire* [and] is not as well positioned as the trial court is to make credibility determinations." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Even "where a trial court [finds] a prima facie case out of an abundance of caution," if the prosecutor has offered a race-neutral explanation, the ultimate issue of whether or not a "prima facie case was established does not need to be determined" to uphold the trial court's refusal to find a *Batson* violation. *Hicks*, 163 Wn.2d at 492-93; *see also State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (if "the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary prima facie case is unnecessary") (citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). "A trial court's ruling on a challenge for cause is reviewed for manifest abuse of discretion." *State v. Gregory*, 158 Wn.2d 759, 814, 147 P.3d 1201 (2006) (citing *State v. Brown*, 132 Wn.2d 529, 601-02, 940 P.2d 546 (1997)).

At the time of Thomas's retrial on aggravating factors, neither the trial court, nor the parties had the benefit of our decision in

Hicks. Although the court was mistaken as to the standard for establishing a prima facie case of discrimination, the trial court heard the State's reasons for striking the juror and found them to be race-neutral. This finding of a race-neutral motivation for striking juror 33, after hearing arguments in support of and against, is a correct application of the law: that a prima facie determination need not be had where the State has offered a race-neutral reason for exclusion of a juror from the venire. *Hicks*, 163 Wn.2d at 492-93; *Luvane*, 127 Wn.2d at 699. The trial court's decision to reject Thomas's *Batson* challenge was not an abuse of discretion.

CONCLUSION

We affirm Covell Paul Thomas's sentence of life without the possibility of parole on the bases of the jury's finding that four aggravating factors applied specifically to him.

No. 80643-8

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice James M. Johnson

Justice Tom Chambers
